

ARDIS ROBINSON  
v.  
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-10-A

Decided August 13, 1991

Appeal from a hold placed on funds in an Individual Indian Money account.

Reversed.

1. Constitutional Law: Due Process--Indians: Financial Matters:  
Individual Indian Money Accounts

Due process requires that the owner of an Individual Indian Money account be afforded a prompt hearing when a hold is placed on funds in the account.

2. Claim By the United States--Indian Probate: Bureau of Indian Affairs: Generally--Indians: Financial Matters: Individual Indian Money Accounts

The Secretary of the Interior is authorized to waive use of funds in Individual Indian Money accounts to satisfy indebtedness of Indians to the United States resulting from errors in recording Indian probate distributions.

APPEARANCES: David L. Irving, Esq., Glasgow, Montana, for appellant; George T. Skibine, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Ardis Robinson seeks review of a January 21, 1987, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming a hold placed on her Individual Indian Money (IIM) account for the purpose of recovering funds erroneously paid to her. For the reasons discussed below, the Board reverses the Area Director's decision and orders the hold released.

### Background

On April 7, 1971, the Secretary of the Interior issued an Order Approving Will and Decree of Distribution in the estate of Angeline Takes the Shield Iron Bear, Standing Rock Sioux Allottee No. 615, Indian Probate K-175-70-S. Under the order, appellant received a 2/28 share in certain trust property. However, BIA erroneously recorded her share in the title records as a 1/9 share and consequently paid lease income into her IIM account based upon a 1/9 share. In August 1982, an oil company landman discovered the error in the title records and brought it to the attention of BIA.

On May 18, 1983, an administrative hold was placed on appellant's IIM account, apparently by the Acting Superintendent, Fort Peck Agency, BIA. The hold was intended to preclude disbursements to appellant in order to accumulate funds to reimburse the heirs who had been underpaid as a result of the BIA error.

By letter of January 15, 1986, the Superintendent notified appellant that \$27,786.41 had been paid into her IIM account erroneously and that this amount would be withdrawn from her account and paid to the other heirs. The Superintendent also informed appellant that she could request a hearing. Appellant made such a request and, on March 14, 1986, a hearing was held before the Superintendent. Appellant was represented by her attorney who, among other things, objected to the length of time the matter had been pending and the fact that appellant was not formally notified of the hold on her account for nearly 3 years after it was put in place.

On April 1, 1986, the Superintendent issued a decision holding that the entire balance of appellant's IIM account would be transferred to the other heirs and that the hold on appellant's account would remain in place until the entire amount overpaid to her, \$27,786.41, was recovered. <sup>1/</sup>

Appellant appealed the Superintendent's decision to the Area Director. Her principal argument was that BIA failed to comply with the mandate of Kennerly v. United States, 721 F.2d 1252 (9th Cir. 1983), because it did not provide a prompt post-deprivation hearing before an impartial decisionmaker. Appellant contended that she suffered a serious loss as a result of the 3-year interval between the placement of the hold on her account and the hearing. She stated that, despite several inquiries, she had been unable to learn either the reason for the hold or the length of time the hold would remain in effect. Further, she stated, she and her family had been damaged financially because of her lack of access to funds in the account. Finally, appellant argued that, because her due process rights had been violated, and because BIA failed to prosecute its claim against her in a timely manner, she should be allowed to retain the overpayments.

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<sup>1/</sup> Appellant's account contained approximately \$16,000 on Apr. 1, 1986.

In a letter to appellant's attorney dated January 21, 1987, the Area Director affirmed the Superintendent's decision. The letter stated in part:

Your argument concerning the lack of timeliness for taking action, on the part of the Bureau of Indian Affairs, has been taken into consideration.

The fact still remains that (appellant) did receive moneys erroneously for a period of 10 years, until it was discovered in 1982 by a person reviewing title status at the Fort Peck Agency.

The decisions of the Comptroller General of the United States, file B-219235, dated April 29, 1986, concerning a similar case, page 5 states: "It is a fundamental rule that persons who receive moneys erroneously paid by a Government Agency or official, acquire no right to such money and the courts consistently have held that such persons are bound in equity and in good conscience to make restitution." The Comptroller General goes on to cite two examples, DiSilvestro vs. United States [, 405 F.2d 150, (2d Cir. 1968), cert. denied, 396 U.S. 964 (1969),] and United States vs. Bentley [, 107 F.2d 382 (2d Cir. 1939)]. In both court decisions, the court said that even though the Government agency or official erroneously paid out the money, the individual did not acquire right to the moneys.

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It should be noted that the important point in the Kennerly process is that the decision to disburse moneys is the point at which due process must be given, before the property is taken from the individual, in this case the IIM account holdings.

The Superintendent, in 1983, had established the hold on the account. In 1986, the Superintendent notified your client of the decision to disburse moneys from the individual's account and due process was given to your client at that time.

Appellant appealed the Area Director's decision to the Washington, D.C., office of BIA. 2/ By memorandum of October 24, 1990, the Acting Assistant Secretary - Indian Affairs transferred the appeal to the Board. By memorandum of December 13, 1990, he authorized the Board to review the

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2/ Under the appeal regulations in effect in 1987, Area Directors' decisions were appealable to the Commissioner of Indian Affairs. 25 CFR 2.3(a) (1987).

exercise of discretionary authority by BIA. 3/ Both appellant and the Area Director filed briefs before the Board.

### Discussion and Conclusions

Appellant argues that her right to due process has been violated. She also contends that BIA is precluded, both by recent case law and by the statute of limitations at 28 U.S.C. § 2415 (1988), from collecting the overpaid amount from her. Further, she argues that the Comptroller General's decision cited by the Area Director is actually supportive of her position, rather than the Area Director's.

[1] The due process standards concerning the collection of debts from IIM accounts were set in Kennerly, supra, decided in December 1983. The court held that, before an individual Indian could be finally deprived of his/her interest in an IIM account, notice and some form of hearing was required. "[I]n some cases," the court stated, "due process may be satisfied by a prompt post-deprivation hearing if that opportunity is afforded prior to the final termination of a property interest and if the length or severity of the deprivation does not itself constitute a serious loss." 721 F.2d at 1258.

In a September 6, 1989, memorandum concerning this matter, the Associate Solicitor for Indian Affairs concluded that a deprivation occurred at the time a hold was placed on appellant's IIM account and that her right to a "prompt post-deprivation hearing" arose at that point, not, as the Area Director held, 3 years later when BIA proposed to disburse the funds. The Associate Solicitor noted that BIA's regulation implementing the decision, which became effective on February 21, 1986, reflects this interpretation. 4/

The Board agrees that, under the Kennerly standards the hearing in appellant's case should have been offered as soon as a hold was placed on her account, i.e., in May 1983. Appellant's right to due process was violated when she was not afforded a hearing at that time. However, the fact that appellant has suffered a due process violation does not mean that she is entitled, as a matter of law, to retain the overpayment.

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3/ 43 CFR 4.330(b) provides: "Except as otherwise permitted by the Secretary or the Assistant Secretary - Indian Affairs by special delegation or request, the Board shall riot adjudicate: \* \* \* (2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority." 4/ 25 CFR 115.10(a), as effective Feb. 21, 1986, provides in part:

"If under § 115.9 an individual's access to funds in the individual's Indian money account is limited, or it is proposed to pay creditors, \* \* \* the individual must be notified in writing as follows:

"(1) The notice [offering a hearing] must be given to the individual affected at the commencement of the restriction, or at least 40 days prior to involuntary distribution of funds from the account."

Pivotal to the resolution of this appeal is the Comptroller General's decision cited by both appellant and the Area Director. In his 1989 memorandum, which discussed, inter alia, the Comptroller General's decision, the Associate Solicitor concluded that BIA is not legally mandated to recover the overpayment from appellant and that BIA's decision in this regard is a discretionary one, with respect to which equitable considerations may be taken into account.

Comptroller General's Decision B-219235, 65 Comp. Gen. 533 (1986), concerned overpayments to two individual Indians resulting from an incorrect order in an Indian probate. The overpayments, consisting of cash proceeds from the sale of interests in trust land, were deposited into the IIM accounts of the two individuals. One, an adult, withdrew the funds from her account. The other was a minor; her funds were therefore retained in her IIM account. After discovery of the error and correction of the probate order, BIA recovered the amount overpaid to the minor, plus interest, from her IIM account. BIA also recovered principal and interest from the adult through offset against her inheritance from her father. Apparently, neither individual was given notice of these actions or any opportunity to challenge them. Later, BIA sought advice from the Comptroller General as to whether the recoveries were proper and, if they were not, whether appropriated funds could be used to reimburse the two individuals.

[2] The Comptroller General's response first discussed the general rules concerning overpayments by a Government agency and overpayments by trustees. This was the portion of the decision relied upon by the Area Director. The Comptroller General continued, however:

In its management of Indian trust funds the United States has charged itself with "moral obligations of the highest responsibility and trust," and its conduct in dealing with Indians should be judged by the "most exacting fiduciary standards."

Consistent with these general trust responsibilities, by statute, regulation, and precedent of the Interior Board of Indian Appeals, the Secretary of the Interior is authorized to waive use of IIM account monies to satisfy indebtedness of Indians to the United States. Section 410 of title 25 of the United States Code states:

No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against such Indian contracted or arising during such trust period \* \* \* except with the approval and consent of the Secretary of the Interior.

Moreover, section 115.9 of title 25 of the Code of Federal Regulations authorizes but does not require the Secretary of the Interior to apply IIM account monies against indebtedness to the United States. \* \* \*

\* \* \* [T]he Interior Department policy in effect at the time the overpayments \* \* \* were recovered was that distribution under a legal probate order should stand, and recoveries of overpayments could only be effected through transfers of funds remaining in IIM accounts from the original distributions. [5/]

We think the authorities described prevail over the Federal Government's general debt collection responsibilities. In United States v. Mossette, 9 IBIA 151, 153-54 [(1982), the Interior Board of Indian] Appeals held that neither the Federal Claims Collection Act nor its implementing regulations repealed or overrode the Secretary's trust duties to American Indians, or affected the Secretary's authority to approve or disapprove use of IIM funds including approval of payment of debts.

65 Comp. Gen. at 537-38. The Comptroller General invoked a policy statement issued by the Deputy Commissioner of Indian Affairs on January 6, 1960, which stated:

[Y]ou suggest that we -

“Take the stand that since the initial distribution of monies is made on a legal Order issued in good faith, we have no direct authority to initiate collection proceedings against the heirs at law named in the original order in an attempt to restore the original value of the estate; further that a new 'Order' be construed to apply only to subsequent deposits.’

“We concur in the thought expressed in this proposal--that any distribution made under a legal order shall stand. Of course, further distribution of funds pursuant to such an order should be

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5/ The Comptroller General noted that

"Interior's policy has some analogous support in statute. For example, section 5584 of title 5 of the United States Code permits waiver of an overpayment to a Federal Government employee when collection would violate equity and good conscience and would not be in the best interests of the United States. Furthermore, both the Federal Claims Collection Act and the general principles of private trust law allow for waiver of collection when a debtor does not have the present or prospective ability to pay. 31 U.S.C. § 3711(a)(3); III Scott, Law of Trusts § 254.1 (3rd ed. 1967); Restatement (Second) of Trusts § 254 (1959)."

65 Comp. Gen. 538 n.5.

6/ The policy statement was contained in a memorandum addressed to "Area Directors and Accounting Offices." It was based upon a Nov. 24, 1959, memorandum which had been concurred in by the Solicitor's Office.

suspended pending the final outcome of any proceedings looking to a modification or change in the original probate order, and the continuance of distribution will be guided by the terms of any new order."

(Deputy Commissioner's Jan. 6, 1960, memorandum at 2-3). Under this policy, the Comptroller General concluded, it was error for BIA to recover from the adult individual because the funds erroneously distributed to her were no longer in her IIM account. He further concluded, however, that it was proper for BIA to recover from the minor because the funds erroneously distributed to her remained in her IIM account. 7/

As far as the Board is aware, the 1960 policy statement is still in effect. None of the Assistant Secretary's or the Area Director's statements in this appeal indicate that the policy has been rescinded or superseded. The Associate Solicitor, however, considered the policy statement inapplicable to this matter because the error here occurred, not in the probate order, but in BIA's recording of the estate distribution under the order (Associate Solicitor's Sept. 6, 1989, memorandum at 4).

Even though the policy statement may not have exact application here, the Board finds that it provides the guidance by which the decision in this case should be reached. As the Comptroller General indicates and the Associate Solicitor explicitly states, the decision is a discretionary one. It involves the authority of the Secretary under 25 U.S.C. § 410 (1988) "to waive use of IIM account monies to satisfy indebtedness of Indians to the United States." 65 Comp. Gen. at 538. Pursuant to the Assistant Secretary's December 31 1990, memorandum, the Board has been authorized to exercise the discretion necessary to review the Area Director's decision.

Consistent with the spirit of the policy statement, therefore, as well as the principles enunciated in the Comptroller General's decision, the Board finds that BIA may not recover the overpayment to appellant. 8/ In reaching this conclusion, the Board takes into account, not only the trust responsibility, but also equitable considerations, including the

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7/ With respect to recovery from the minor, the Comptroller General stated:

"Although it is arguable from a strict reading of the January 6, 1960 BIA memorandum that the overpayment and the accrued interest attributable to the overpayment should not have been recovered, we think the better view is the memorandum contemplated that collection would take place if there still remained monies in an IIM account from the original distribution." 65 Comp. Gen. at 539. Cf. Kaibab Band of Paiute Indians v. Acting Phoenix Area Director, 15 IBIA 277 (1987) (Judgment fund per capita payments erroneously deposited into a tribal trust account, and still in the account, should be repaid by the tribe).

8/ The Board recognizes that it is possible some of the funds presently in appellant's IIM account may have derived, as lease income, from the incorrectly recorded interest in trust land. Under the theory of the 1960 policy statement, as interpreted by the Comptroller General, any such funds

initial and continued violation of appellant's due process rights, the extensive length of time her account has been subject to the hold, and the financial hardships the hold has caused appellant and her family.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, and by the Assistant secretary - Indian Affairs, 43 CFR 4.330(b), the Acting Billings Area Director's January 21, 1987, decision is reversed. The Area Director shall immediately release the hold on appellant's IIM account. 9/

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Anita Vogt  
Administrative Judge

I concur:

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Kathryn A. Lynn  
Chief Administrative Judge

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fn. 8 (continued)

would arguably be subject to recovery by BIA as funds attributable to the original BIA error. However, the Board assumes that, if there are any such funds presently in the account, they are minimal. This assumption is based upon the further assumption that BIA corrected the land records promptly upon discovery of the error and therefore was no longer depositing lease income from the incorrectly recorded interest into appellant's IIM account at the time the hold was placed on the account.

9/ This disposition does not relieve BIA of the obligation to compensate the other heirs for the underpayments to them. BIA shall promptly take whatever steps are necessary to accomplish this.